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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949

No. 150

THE TRAILMOBILE COMPANY,

*Petitioner,*

v.

THOMAS BRITT,

*Respondent.*

No. _____

THE TRAILMOBILE COMPANY,

*Petitioner,*

v.

ROY EDWARD MAPPES,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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*To the Honorable Justices of the Supreme Court of the United States:*

Petitioner herein prays that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit, entered January 24, 1950, rehearing denied March 31, 1950, reversing summary judgments, of dismissal of the complaints, in favor of petitioner against respondents, Thomas Britt and Roy Edward Mappes.

## OPINIONS BELOW

The opinion of the District Court (R. 7, 19) is unreported.

The opinion of the Court of Appeals (R. 24) is reported in *Thomas Britt* v. *The Trailmobile Company; Roy Edward Mappes* v. *The Trailmobile Company,* 179 F. (2d) 569. Petition for rehearing (R. 35) was denied without opinion (R. 47), ... F. (2d) ....

## JURISDICTION

The jurisdiction of this Court in these causes is based upon Title 28, U. S. C. A., § 1254 (1), c. 646, 62 Stat. 928.

The jurisdiction of the United States District Court which rendered the judgments from which the appeals were taken was conferred by the Selective Training and Service Act of 1940, as amended (Title 50, U. S. C. A., App. Sec. 308, c. 720, Sec. 8, 54 Stat. 890, as amended July 28, 1942, c. 529, Sec. 2, 56 Stat. 724, as amended Dec. 8, 1944, c. 548, Sec. 1, 58 Stat. 798, as amended June 29, 1946, c. 522, Sec. 1, 60 Stat. 341). (Appendix A hereto.)

The judgments of the Court of appeals were entered on January 24, 1950 (R. 23, 24). Petition for rehearing filed on February 7, 1950 (R. 35) was denied on March 31, 1950 (R. 47).

## QUESTIONS PRESENTED

1. Where a war veteran seeking redress under the Selective Training and Service Act for a discharge resulting from his reduced seniority alleges as the sole ground for his discharge the invalidity of a labor agreement fixing that seniority, adjudged to be lawful in a prior case,[1] can the Court of Appeals reverse a summary judgment based on res adjudicata and remand with instructions to determine unpleaded "grounds for discharge?"

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[1] *Trailmobile Co., etc.* v. *International Union, CIO, etc.,* 162 F. (2d) 720.

2. Did the Court of Appeals err as a matter of law in holding, after its determination of the issues of discrimination and res adjudicata, that a genuine issue of material fact remained to be adjudicated, when none in fact appears in the complaint or otherwise?

## STATUTE INVOLVED

The pertinent statutory provisions are set forth in Appendix A.

The rules of Court involved herein are Federal Rules of Civil Procedure, Rule 12(b) and Rule 56; also Supreme Court Rule 38(5)(b).

## STATEMENT OF THE CASE

### A. General.

Thomas Britt and Roy Edward Mappes, re-employed veterans, in separate complaints, sued their employer, The Trailmobile Company, in the United States District Court for the Southern District of Ohio, for compensation alleged to be due each of them by reason of his discharge from his position within one year after such re-employment, in violation of Section 8(c) of the Selective Training and Service Act of 1940. U. S. C. A., Title 50, § 308, as amended. The complaints allege that the cause of discharge was as follows:

The Britt complaint (R. 1) alleges that Trailmobile discharged him because of his reduced seniority, which was caused by the 1944 collective bargaining agreement between the union and the company; that the agreement reduced his seniority from March 19, 1933, the date of his employment by The Highland Body Manufacturing Company, to January 1, 1944, the date when Highland was taken over by Trailmobile; that his discharge was within the protected first year of employment; that the 1944 contract

was entered into while he was in the armed service and was thus illegal, and that the illegal contract resulted in discrimination against him. The question of the validity of the contract was the sole issue because a discharge resulting from a valid contract would have been a discharge "for cause" under the Selective Training and Service Act, and the complaint would thus have to be dismissed.

The Mappes complaint (R. 13) similarly alleges that "in consequence of his lack of seniority" under the 1944 collective bargaining agreement he was discriminated against and discharged in violation of the Selective Training and Service Act.

These complaints were filed on September 30, 1948, about eighteen months after the decision of this Court in *Trailmobile Company et al.* v. *Whirls*, 331 U. S. 40, decided April 14, 1947.

On June 4, 1947, the United States Circuit Court of Appeals for the Sixth Circuit decided *Trailmobile Company, etc.* v. *International Union, etc., UAW-CIO*, 162 F. (2d) 720. That appeal by Trailmobile was from a judgment of the District Court dismissing for want of jurisdiction a complaint for a declaratory judgment filed by Trailmobile to have adjudicated the seniority rights of all its employees affected by the conflict between rights asserted under the 1944 collective bargaining contract and rights asserted under Section 8 of the Selective Training and Service Act of 1940.[2] The dismissal was entered by the District Court on May 31, 1946. Britt and Mappes were individually named in Exhibit C of that complaint as being members of the same class of employees as was represented by one Cecil Walls, who was sued therein individually and as a representative of that class. *Trailmobile Co.* v. *Interna-*

[2] The District Court held that the Declaratory Judgment Act, 28 U. S. C. A. § 400, could not be invoked by an employer to determine rights of veterans under the Selective Training and Service Act, 67 F. Supp. 53.

*tional Union, C. I. O.*, 67 F. Supp. 53, 54. After the decision of this court in *Whirls*, supra, and being in doubt as to whether that decision had settled all questions of seniority regarding its employees, Trailmobile urged the Circuit Court of Appeals to reverse so that the complaint could be determined on its merits. The Union, representing Trailmobile employees, moved that the appeal be dismissed pleading that *Whirls* was dispositive of all the issues in the complaint. The United States District Attorney, representing the former Highland employee veterans, urged that *Whirls* was not dispositive of their rights (R. 26). The Circuit Court of Appeals heard the appeal on June 2, 1947, *six months after Britt and Mappes had been discharged.* That court did pass on the merits of Trailmobile's complaint, and found that the *Whirls* decision disposed of all the issues therein contained (R. 26). The result of that decision on the merits called for a dismissal, as had been granted below in the District Court, and the Circuit Court of Appeals accordingly entered an order on June 4, 1947, deciding the issues, and affirmed the dismissal of the complaint. *Trailmobile Co. et al.* v. *International Union, etc., UAW-CIO*, 162 F. (2d) 720. See Court of Appeals present construction of that opinion (R. 26).

No further proceedings were taken seeking a review from that judgment of the Circuit Court of Appeals. Even though that judgment may have been erroneous, it was res adjudicata in a subsequent suit between parties thereto, including members of a class represented therein as to issues determined. *United States* v. *Moser*, 266 U. S. 236, 242. The court below decided that its prior decision was res adjudicata (R. 30).

All of these four cases, including the *Britt* and *Mappes* cases, are part of a general controversy over seniority rights which arose among the employees of The Trailmobile Company and its wholly-owned subsidiary, The Highland

Body Manufacturing Company, following the consolidation of those two corporations on January 1, 1944. All of these four cases were filed in and adjudicated by the same United States District Court, and each presented a problem of the seniority standing of re-employed veterans under the same collective bargaining agreements in effect during the years 1942 and 1944 (R. 3, 15, 24, 25). The problems arose under Section 8 of the Selective Training and Service Act of 1940. Britt and Mappes, like Lawrence Whirls, were former employees of The Highland Body Manufacturing Company and had seniority rights under the 1942 collective bargaining agreement when they entered the military service (R. 24). Whirls was re-employed by Highland and had been employed a full year prior to the modification of his seniority by the collective bargaining agreement effective as of January 1, 1944 (R. 24). Britt and Mappes were re-employed by Trailmobile after the January 1, 1944 date (R. 3, 16). Their seniority was modified by the collective bargaining agreement while they were in the military service. The 1944 union agreement was in effect when they were restored to employment by Trailmobile. This agreement was made by the employer with the C. I. O., which was the duly recognized collective bargaining agent of the employees of Trailmobile, including the former Highland employees. 51 N. L. R. B. 1106; 53 N. L. R. B. 1248. This agreement fixed the seniority of all former Highland employees, both veterans and non-veterans, as of January 1, 1944. This same labor contract was held valid and lawful in an action for a declaratory judgment in the Ohio state courts, in *Hess* v. *The Trailer (Trailmobile) Co.*, 31 O. O. 566, 17 O. Supp. 39, decided December 19, 1944, affirmed by the Court of Appeals of Hamilton County, Ohio; motion to certify record to the Ohio Supreme Court overruled. 18 Ohio Bar 314.

**B. The District Court Herein Rendered a Summary Judgment on the Merits and Dismissed the Complaint.**

Trailmobile asserted in each of these cases below the defense of res adjudicata. Instead of filing an answer,[3] it exercised the option given by Rule 12(b) of the Federal Rules of Civil Procedure and filed its motion to dismiss on the ground of res adjudicata as to all the issues alleged in the complaint (R. 5, 6, 17, 18). These matters outside the complaint were presented to and not excluded by the District Court, and that court treated the motion as one for summary judgment and disposed of it as provided in Rule 56 of the Federal Rules of Civil Procedure. Neither complainant filed any affidavits against this motion as one for a summary judgment, although he was given reasonable opportunity to present all material made pertinent to such a motion by Rule 56 [Rule 12(b)]. Upon the hearing of the above motion to dismiss, the District Court considered the record in the *International Union CIO* case, supra, then before the court, also the briefs, admissions, and arguments of counsel therein, and granted the motion and entered summary judgment of dismissal of the complaint, absolutely and with prejudice (R. 7, 19), on the ground that the issues and the whole case were res adjudicata by reason of the final order of the United States Circuit Court of Appeals, Sixth Circuit, in *The Trailmobile Company et etc.*, v. *International Union, etc., UAW-CIO*, 162 F. (2d) 720 (R. 7, 19).

It will be noted that the affirmative defense was res adjudicata. There is no express general or specific denial of any fact, material or otherwise, alleged in the complaint, except as necessarily implied from the affirmative defense of res adjudicata. Thus Trailmobile, upon the determination of the affirmative defense of res adjudicata in its favor,

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[3] For convenience, the two cases may hereinafter be referred to in the singular.

was entitled to a summary judgment as a matter of law, under Rule 56(c), if the record shows "that there is no genuine issue as to any material fact," remaining for adjudication.

### C. Decision of the United States Court of Appeals, Sixth Circuit.

The Court of Appeals in its decision first held that the respondents had no seniority status differing from non-veteran employees, pointing out that to adjudicate them as having rights superior to others would apply to them a super-seniority condemned in *Whirls* (R. 28). The court then addressed itself to the contention of respondents herein that the labor agreement was discriminatory and concluded, "Whatever we might think of the unfairness of the differentiation, the discrimination was in pursuance of the bargaining process and not without some basis, forestalled a strike and was therefore not invalid. *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U. S. 521" (R. 30).

The Court of Appeals held that its judgment in the *International Union* case, supra, was res adjudicata in each of these cases as to all matters adjudicated or which might have been adjudicated in the judgment therein entered by the District Court on May 31, 1946 (61 F. Supp. 53) (R. 30).

Through this point in the opinion the court followed a logical and correct interpretation of Section 8 of the Selective Training and Service Act of 1940, the previous decisions of this Court, and its own prior decisions. It is in the last two full paragraphs of the opinion that the Court of Appeals so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Supreme Court Rule 38(5)(b).

It is only from the words in the eighth from last line of Record 30 beginning, "If so, and the discharges were without cause, . . . ," to the end of the opinion that petitioner takes exception. 179 F. (2d) 569, 573.

The court below observed that both Britt and Mappes were discharged on November 23, 1946, after the decision of the District Court in the foregoing *International Union* case, supra, and held that the doctrine of res adjudicata did not apply to these discharges, "if made without cause" (R. 30, 31). The opinion then states:

> "The complaint avers that the appellants were discharged within the first year of their employment. If so, and the discharges were without cause, they were unlawful," etc. (R. 30).
>
> "It follows from what we have said that the orders of dismissal must be set aside and the causes remanded to the district court *for a consideration of the grounds for discharge*, and if found to have been made without cause, for the entry of judgments in the amount of wages and the value of other benefits lost, if any, during the remainder of the employment year following discharge" (R. 31).
>
> "Reversed, and remanded for trial *in conformity herewith*" (R. 31). (Italics supplied.)

The only issue that could be genuinely disputed was the validity of the 1944 collective bargaining agreement. That agreement having been determined to be valid, the fact that respondents were discharged either before or after the decision on May 31, 1946 (67 F. Supp. 53), is immaterial to the issue herein, and we submit there is nothing for the District Court to determine upon remand.

Thus the Court of Appeals held that an issue remains which should have been tried by the District Court without specifying the issue. The only issue under the pleadings could be the validity of the contract. It was the duty of the

Court of Appeals to specify the undetermined material issue of fact to be determined by the District Court. Par*melee* v. *Chicago Eye Shield*, 157 F. (2d) 582.

The only issue made by each complaint was a discharge because of reduction of seniority status through the 1944 contract. Since this contract has now been finally determined to be a valid and lawful agreement, there could not be a discriminatory or "without cause" discharge under the statute. On remand in conformity with this opinion, the District Court will be forced to consider the validity of discharge from facts nowhere pleaded and non-existent (R. 36, 37).

## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

### A. Where No Issues of Fact Exist and Issues of Law Favor Defendant, Summary Judgment for Defendant Should Be Affirmed.

Each of these cases was submitted to the District Court for decision upon the motion of Trailmobile, which had the same legal effect as if Trailmobile had filed an answer setting up the affirmative defense of res adjudicata, and had filed a motion for a summary judgment on the ground that the complaint failed to state a claim upon which relief could be granted, which motion would not deny an allegation of any material fact. Rule 12(b)(6). *Billings Utility Co.* v. *Advisory Committee Board of Governors*, 135 F. (2d) 108 (C. C. A. 8th, 1943). Rule 56(c) requires the existence of a genuine issue as to a material fact, on which to base a denial of a defendant's motion for summary judgment. *Banco de Espana* v. *Federal Reserve Bank of New York*, 28 F. Supp. 958, 973 (D. C. N. Y. 1939); affirmed 114 F. (2d) 438. Where it appears that there are no issues of fact, and the issues of law resolve themselves in favor of the defendant, a summary judgment will be entered on the

defendant's motion. *Jones* v. *Zurich General Accident and Liability Ins. Co.*, 121 F. (2d) 761 [C. C. A. (2d) 1941]; *Schwartz* v. *Levine*, 111 F. (2d) 81 [C. C. A. (2d) 1940]; *Mabardy* v. *Railway Express Agency, Inc.*, 26 F. Supp. 25 (D. C. Mass. 1939). The res adjudicata effect of the former judgment in the *International Union CIO* case, supra, adjudicating as lawful and valid the seniority rights of each of these two employees under the 1944 collective bargaining agreement is to prevent him from maintaining this action, under the complaint filed herein.

If there are no questions of genuine or disputed facts, the court must apply the law in accordance with the admitted facts as disclosed by the record in the case. Rule 56; *Associated Press et al.* v. *United States*, 326 U. S. 1.

The Selective Training and Service Act undertook to give the veteran protection within the framework of the seniority system. *Fishgold* v. *Sullivan Drydock and Repair Corp. et al.*, 328 U. S. 275. A veteran is not accorded by the Act the right to work, when by operation of the seniority system there is none available for him. The opinion in the *Fishgold* case states:

> "We have searched the legislative history in vain for any statement of purpose that the protection accorded the veteran was the right to work, when by operation of the seniority system there was none then available for him" (p. 289).

Seniority established through collective bargaining varies greatly as to the time when seniority begins, determination of the units subject to the same seniority, "and the consequences which flow from seniority." *Campbell* case, supra, p. 526.

Under seniority, as work decreases, some men will be discharged. The men to be discharged must be selected on the basis of seniority. The gist of the complaint herein is

that the complainant has been deprived of his opportunity to work through discharge by the operation of the seniority system, when there was not sufficient work for both himself and other employees with greater seniority, after he had been accorded his full seniority. A discharge by reason of "lack of seniority" means the discharge was a consequence "which flows from seniority," that the discharge followed the conventional sequence of seniority, that the discharge was due to the employer's decreasing the working force on the basis of the relative length of service recognized in the 1944 collective bargaining agreement with the CIO, and thus means that the discharge was for a good business reason and was a discharge for good cause, if the seniority contract was valid.

It will be noted that the complaint does *not* allege, expressly or impliedly, that Trailmobile retained on the job other employees, either veterans or non-veterans, who had a lower shop seniority than the complainant had, or that any other employees were preferred over him in violation of the established seniority system, or that Trailmobile discriminated against him in any manner, but charges solely that Trailmobile discharged him pursuant to and in accordance with his seniority as established under the 1944 collective bargaining agreement.

Therefore, the logical conclusion must be that the terms of the 1944 collective bargaining agreement justified the action of Trailmobile in discharging the employee, that the discharge was not in violation of this collective bargaining agreement, and when that bargaining agreement was held valid, as it was, there remains no issue of other cause, and that the Court of Appeals should have affirmed the summary judgment herein rendered by the United States District Court and thus erred in reversing a summary judgment rendered by the District Court consistent with the provisions of Rule 12 and Rule 56.

**B. Discharge Owing to Reduced Seniority Resulting from a Lawful Collective Bargaining Agreement Is the Only Cause Alleged.**

No other cause for discharge is alleged[4] or implied by any of the allegations of either complaint. Each of these employees relied solely on the charge alleged in the complaint that his discharge was pursuant to and in conformity with his reduced seniority status established by the 1944 collective bargaining agreement. These two cases were filed in the District Court by the United States Attorney, who had knowledge of and was conversant with all the facts relating to the employment and discharge of these two employees, and if there had been a discharge of either of them for any other reason than the one alleged in the complaint herein, it certainly would have been presented in the complaint by the United States Attorney (R. 42).

**C. Unless Erroneous Judgment of Court of Appeals Is Reversed, Doctrine of Res Adjudicata May Foreclose Petitioner's Rights in Future Appeals.**

The Court of Appeals erroneously found: "Res adjudicata does not, therefore, apply to these discharges if made without cause, and the appellants are entitled to a remedy" (R. 31). Then the court erroneously remanded the causes to the District Court, "for a consideration of the grounds for discharge, and if found to have been made without cause, for the entry of judgment in the amount of wages and the value of other benefits lost, if any, during the remainder of the employment year following discharge" (R. 31), and the court ordered the case "Reversed, and remanded for trial in conformity herewith."

This appeal is made to correct this error which, if permitted to stand, might force the District Court into an erroneous decision, requiring further appeals. If the District Court under the present decision found causes for

[4] Nor could be alleged because of the facts. See R. 36, 37.

discharge not pleaded in the complaints, the doctrine of res adjudicata might bar Trailmobile from asserting error in a further appeal therefrom.

This decision and mandate are prejudicial to Trailmobile and erroneously hold in effect that there was a triable, genuine issue of a material fact joined in the District Court other than the validity of the bargained seniority, and direct that the case be tried on such an issue which is not in either complaint. The Court of Appeals erroneously holds, in violation of Rule 12 and Rule 56 of the Federal Rules of Civil Procedure, that the *grounds* for discharge should be considered and tried by the District Court, and, if found to have been made without cause, for the entry of judgments for complainants.

After a case has been determined by the reviewing court and remanded to the trial court, the duty of the latter is to comply with the mandate of the former. This mandate is binding and must be strictly followed. *Briggs, Admx.* v. *Pennsylvania Railroad Company*, 334 U. S. 304, 306:

> "In its earliest days this court consistently held that the inferior court has no power or authority to deviate from the mandate issued by an appellate court. (Citing cases). The rule of these cases has been uniformly followed in later cases; see for example (citing cases)."

The Federal Rules of Civil Procedure are designed to accomplish the desired end of the just, speedy, and inexpensive termination of an action, and thereby to facilitate the administration of justice.

This Court in a proper case will review the action of the Court of Appeals and direct that court to apply and enforce the Federal Rules of Civil Procedure and dispose of the case in accordance with such rules. This reversal of a summary judgment by the Court of Appeals in violation of these rules presents irregularities in practice

which, we respectfully submit, this Court should not overlook, and which should not be permitted to become a precedent for future violations of these Rules 12 and 56. Supreme Court Rule 38(5)(b).

## CONCLUSION

The Court of Appeals, correctly following the previous decisions of the Court involving the re-employment of veterans, erroneously remanded these cases to the District Court for a determination of issues not made up by the pleadings. Thus the District Court is told to do that which it cannot do, to-wit; either find the collective bargaining contract invalid, or go beyond the record for facts not pleaded and impossible of proof. Under Federal Rules 12 and 56 summary judgment should have been granted and the Court of Appeals should not have remanded the case. Under Supreme Court Rule 38, this Court may correct that erroneous remand.

WHEREFORE, your petitioner prays that a Writ of Certiorari may be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the Sixth Circuit, to the end that the judgments of said court in these cases may be reviewed by this Court.

Respectfully submitted,
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## APPENDIX A

U. S. C. A. TITLE 50, APP. § 308. As amended Dec. 8, 1944, c. 548, § 1, 58 Stat. 798; June 29, 1946, c. 522, § 1, 60 Stat. 341.

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year——

(A) If such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(C) If such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay.

U. S. C. A. TITLE 50, APP. § 308. As amended July 28, 1942, c. 529, § 2, 56 Stat. 724.

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insur-

ance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."